Mohd Yusof bin Said v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–8–92
ANUAR CJ (MALAYA), MOHD AZMI AND MOHAMED DZAIDDIN FCJJ
9 FEBRUARY 1996

Criminal Law *— Dangerous Drugs Act 1952 — Section 2 — Definition of cannabis — Chemist referred drug as 'cannabis as defined under Dangerous Drugs Act 1952' — Chemist went on to elaborate that resin of cannabis had not been extracted — Whether chemist was referring to cannabis as defined under s 2 of Dangerous Drugs Act 1952 or 'cannabis (Indian hemp) under First Schedule — Dangerous Drugs Act 1952 s 2, 12(2) & 39B(1)(a)*

Criminal Law *— Dangerous Drugs Act 1952 — Section 39B(1)(a), 12(2) — Trafficking in dangerous drugs — Accused charged under s 39B(1)(a) — Chemist referred drug as 'cannabis as defined under Dangerous Drugs Act 1952' — Chemist went on to elaborate that resin of cannabis had not been extracted — Failed to state in unequivocal term the words 's 2 of the Dangerous Drugs Act 1952' when defining cannabis — Whether fatal — Dangerous Drugs Act 1952 s 2, 12(2) & 39B(1)(a)*

This was an appeal against the conviction of the appellant on a charge of trafficking in a dangerous drug, to wit, cannabis, an offence under s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). He was convicted and sentenced to death. The sole ground of appeal was that the trial judge had erred in law in not holding that the evidence of the chemist was insufficient, inadequate, doubtful and ambiguous to prove that the drug was 'cannabis' as defined in the DDA. The chemist had failed to testify that the drug was 'cannabis' as defined in s 2 of the DDA, contrary to the decision of the Federal Court in *Shukri bin Mohamad v PP* [1995] 3 MLJ 229. However, in this case, the chemist had given a detailed account of his examination and analysis of the plant material and testified that the result of his microscopic examination was that there was presence of cannabis resin.

Held, dismissing the appeal:

(1) In this case, the chemist had not only stated that the substance was 'cannabis as defined in the DDA', but also that 'resin had not been extracted', which was one of the ingredients of the definition of cannabis in s 2 of the DDA, ie 'any part of any plant of the genus Cannabis from which the resin had not been extracted' (see p 646H–I); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 distinguished.

(2) Judging from the chemist's detailed testimony regarding his examination and analysis of the plant material, inter alia, that the result of the microscopic examination showed positively that

there was presence of cannabis resin, and that the tests confirmed that the plant material was cannabis, the court formed the view that the cannabis he was talking about was cannabis under s 2 of the DDA, and not Indian hemp. The trial judge did advert to the chemist's evidence that the plant material was cannabis as defined in the DDA (see p 647C–E); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 distinguished.

(3) In this case, the omission of the chemist to state that by 'cannabis' he meant 'cannabis as defined in s 2 of the DDA' had not given rise to the inference that he did not have in mind the ingredients of cannabis in the said section (see p 647F); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 distinguished.

[**Bahasa Malaysia summary**

Ini merupakan suatu rayuan terhadap sabitan perayu atas suatu pertuduhan pengedaran dadah berbahaya, iaitu ganja, satu kesalahan di bawah s 39B(1)(a) dan boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Perayu telah disabitkan dan dihukum mati. Alasan tunggal rayuannya adalah bahawa hakim perbicaraan telah silap dari segi undang-undang dalam tidak memutuskan bahawa keterangan ahli kimia tak cukup, tak memadai, meragukan dan taksa untuk membuktikan dadah itu adalah ganja seperti yang ditafsirkan dalam ADB. Ahli kimia itu telah gagal memberi keterangan bahawa dadah berkenaan adalah ganja seperti yang ditafsirkan dalam s 2 ADB, bercanggahan dengan keputusan Mahkamah Persekutuan dalam *Shukri bin Mohamad v PP* [1995] 3 MLJ 229. Walau bagaimanapun, dalam kes ini, ahli kimia telah memberi suatu keterangan terperinci mengenai pemeriksaan dan penganalisisannya atas bahan tumbuhan dan dia juga telah memberi keterangan bahawa keputusan pemeriksaan mikroskopik menunjukkan terdapatnya resin ganja.

Diputuskan, menolak rayuan tersebut:

(1) Dalam kes ini, ahli kimia bukan sahaja telah menyatakan bahawa bahan itu adalah ganja seperti yang ditafsirkan dalam ADB, tetapi juga bahawa 'resin belum dipisahkan', yang merupakan salah satu daripada unsur-unsur tafsiran ganja dalam s 2 ADB, iaitu 'mana-mana bahagian dari sebarang tumbuhan dari golongan ganja dari mana resin belum dipisahkan' (lihat ms 646H–I); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 dibeza.

(2) Berdasarkan testimoni terperinci ahli kimia mengenai pemeriksaan dan penganalisisan bahan tumbuhan, antara lain, bahawa keputusan pemeriksaan mikroskopik menunjukkan dengan positif bahawa terdapat resin ganja dan bahawa ujian-ujian mengesahkan bahawa bahan tumbuhan adalah ganja, mahkamah berpendapat

ganja yang dimaksudkannya adalah ganja di bawah s 2 ADB, dan bukannya Hemp dari India. Hakim perbicaraan sememangnya telah merujuk kepada keterangan ahli kimia bahawa bahan tumbuhan tersebut adalah ganja seperti yang ditafsirkan dalam ADB (lihat ms 647C–E); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 dibeza.

(3) Dalam kes ini, kegagalan ahli kimia untuk menyatakan bahawa apabila dia menyebut 'ganja' dia bermaksud 'ganja seperti yang ditafsirkan dalam s 2 ADB' tidak menimbulkan inferens bahawa dia tidak memikirkan unsur-unsur ganja dalam seksyen tersebut (lihat ms 647F); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 dibeza.]

Notes

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 26–108; [1989] Mallal's Digest 592–621; [1990] Mallal's Digest 463–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 657–671; [1993] Mallal's Digest 526–538; [1994] Mallal's Digest 849–870.

Cases referred to

Quinn v Leathem [1901] AC 495 HL

Saime bin Jaafar v Pendakwa Raya (Federal Court Criminal Appeal 05-99-93) (unreported)

Shukri bin Mohamad v PP [1995] 3 MLJ 229

Legislation referred to

Dangerous Drugs Act 1952 ss 12, 39B(1)(a), (2)

Appeal from: Criminal Suit No 47-30-91 (High Court, Kangar)

Gurbachan Singh (Bachan & Kartar) for the appellant.

Mohd Yusof bin Hj Zainal Abiden (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Dzaiddin FCJ (delivering the judgment of the court): The appellant was charged in the High Court, Kangar, for trafficking in a dangerous drug, to wit, cannabis, weighing 1,302.9g at about 12 noon at 30km Jalan Kangar, Padang Besar, Perlis, on 2 March 1989 under s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). He was convicted and sentenced to death.

Before us, the sole ground of appeal that was argued was that the learned judge erred in law in not holding that the evidence of the chemist, PW1, was 'insufficient, inadequate, doubtful and ambiguous to prove that

the drug was 'cannabis' as defined in the Act'. It was the submission of Encik Gurbachan that the chemist, in his evidence, failed to testify that the impugned drug was 'cannabis' as defined under s 2 of the Act, contrary to the decision of this court in *Shukri bin Mohamad v PP* [1995] 3 MLJ 229. Hence, counsel submitted that following *Shukri*, the conviction of the appellant under s 39B(1)(a) of the Act should be quashed and the sentence of death be set aside, and substituted with a conviction under s 12(2) of the Act.

For the purpose of this appeal, we do not propose to deliberate on the full facts of the case, except to recap the evidence of the chemist, PW1, with respect to his examination and analysis of the newspaper packages containing 1,302.9g of cannabis. In his evidence (p 3 of the appeal record), PW1 testified as follows:

> On 10 April 1989, I received four envelopes marked E, E1, E2, E3 from Insp Roslan bin Ali (identified). I gave acknowledgement receipt (p/i P2).
>
> With regard to the four envelopes, I examined the content of the envelopes and I found in envelope 'E' two newspaper packages. I weighed one of the packages and I removed the wrappers and weighed it. From there, I obtained the net weight of the content. I found the content to consist of dry plant material with characteristic features similar to that of cannabis.
>
> I then took representative sample from the dry plant material and did the following tests:
>
> (i) Microscopic examination
>
> Under the said examination, I detected the presence of cannabis resin and also microscopic features of plant material similar to that of cannabis.
>
> (ii) Duquenois Levin test
>
> It was positive, indicating that plant material is cannabis.
>
> (iii) TLC
>
> This confirmed that plant material is cannabis.
>
> I did the same thing for the other package in envelope 'E'.
>
> I found the net weight of one of the packages to be 198.5g, and the net weight of plant material of the other package to be 184.7g. Hence, I found envelope 'E' contained a total of 383.2g of cannabis.
>
> Similarly, I did the same thing in respect of plant material in envelope E1. I found envelope E1 to contain two newspaper packages. One of the packages had a net weight 244.5g of cannabis. The other package had 250.4g cannabis. This gave a total of 494.9g cannabis.
>
> I did the same test and weighing in respect of the packages in envelope E2. I found a newspaper package containing 222.4g cannabis.
>
> I did the same test and weighing in respect of envelope E3. I found a newspaper package containing 202.4g cannabis.

By 'cannabis', I mean cannabis as defined under DDA 1952. Resin had not been extracted. (Emphasis added).

The question which arises for our decision is whether the above testimony of the chemist, PW1, to the effect that by 'cannabis' he meant cannabis as defined under DDA 1952 and that resin had not been extracted; without specifying the crucial words 's 2', has given rise to the inference that he did not have in mind the ingredients of cannabis as defined in the said s 2 of the Act.

In *Shukri*, the appellant appealed to the Federal Court on the ground that the trial judge was wrong in relying on the evidence of the chemist who merely stated that what he had analysed was 'cannabis' as defined in the DDA 1952 without mentioning s 2 of the Act. The court found as follows (at p 232):

> A scrutiny of the record provided shows that, in essence, all the chemist had said on the point at issue was that the result of his examination and analysis of the various quantities of plant material which constituted the subject-matter of the charge aforesaid, showed that in each case it was '*cannabis as defined in the Dangerous Drugs Act 1952*', the aggregate net weight of the cannabis being 25,664.8g. The judge's notes of evidence show that there were repeated references by the chemist to the expression 'cannabis as defined in the DDA 1952' with no mention made at any time of the definition section in the Act of cannabis, to wit, s 2, which at the material time, provided as follows: "'cannabis' means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated'.
>
> The glaring omission by the chemist to refer to s 2 of the Act could give rise to the inference that he did not have in mind the ingredients of cannabis as defined therein, and as explained in the Supreme Court case of *PP v Alcontara* [1993] 3 MLJ 568 at p 577.

And at p 233, the court considered the following infirmities:

> In the present case, the testimony of the chemist also suffered from the defects that it made no mention of the results of his physical examination nor did he mention whether he had carried out any, and if so, what tests. We are thus reminded of some of the infirmities from which the testimony of the chemist in the Supreme Court case of *Leong Bon Huat v PP* [1993] 3 MLJ 11 suffered ...

The court further found as follows (at p 234):

> Turning to the grounds of judgment, we note that nowhere in it is there any indication that the judge recognized the infirmities in the testimony of the chemist to which we have adverted nor did he even make the basic finding of fact that the plant material which was the subject-matter of the charge was 'cannabis' within the meaning of s 2 of the Act.

Thus, (on the same page):

> Having regard to the infirmities in the testimony of the chemist to which we have adverted, his testimony is open to the construction that the plant material examined by him was either 'cannabis' within the meaning of s 2 of the Act *or* that it was 'cannabis' (Indian Hemp)' listed in Pt III of the First Schedule of the Act, though nowhere defined in the Act.

Hence, on the principle that where two views can reasonably be entertained regarding the meaning and effects of provision in a highly penal statute that in favour of the accused should be adopted, the court ruled (at p 236) as follows:

> When, therefore, as here, the court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness the court should make a finding in the lower degree particularly where a finding in a higher degree will give rise to a mandatory sentence of death. (See *Leong Bon Huat*'s case [1993] 3 MLJ 11 at p 15E–F).
>
> In the result, we allow the appeal, quash the conviction, set aside the sentence of death, and substitute, in lieu thereof, a conviction under s 12(2) of the Act, and a sentence of five years' imprisonment which, it will be recalled, is the maximum sentence of imprisonment provided under s 12(3) to take effect from date of arrest.

The ratio in *Shukri* was followed by this court in *Saime bin Jaafar v Pendakwa Raya* (Federal Court Criminal Appeal 05–99–93) (unreported) at its sitting in Ipoh on 11 December 1995. In that case, the evidence of the chemist was to the effect that he examined and analysed the dried leaves found in the packages inside two plastic bags. He found them to be cannabis or 'ganja' and concluded as follows, 'cannabis adalah seperti ditakrifkan dalam Akta Dadah Berbahaya 1952.'

The court held, following *Shukri*, that the evidence of the chemist that cannabis as defined in the DDA 1952 without mentioning 's 2 of the Act' gave rise to an inference that he did not have in mind the ingredients of cannabis as defined in s 2. The appeal was allowed with the conviction and sentence under ss 39B(1)(a) and 39B(2) of the Act quashed and substituted with a conviction under s 12(2) and punishable under s 12(3) of the Act.

It could thus be seen that the evidence of the chemist in *Saime* suffered from the same defects as in *Shukri* in failing to mention s 2 of the Act, although under cross-examination the chemist testified that he conducted the laboratory tests.

In our opinion, the rationale in *Shukri* for requiring the chemist to state the expression that 'cannabis as defined in s 2 of the DDA 1952' seems to be that he should be unequivocal, and not be in any doubt that the plant material which he had examined and analysed was cannabis as defined in s 2; and not cannabis as listed in Pt III of the First Schedule

where the words 'cannabis (Indian Hemp)' appear, though nowhere defined in the Act. Thus, the '.. glaring omission by the chemist to refer to s 2 of the Act could give rise to the inference that he did not have in mind the ingredients of cannabis as defined therein ...' (per Edgar Joseph Jr FCJ at p 232).

We are in complete agreement with the ratio in *Shukri* because based on the chemist's evidence, as found by the court, all he had said was that the result of his examination and analysis of the various quantities of plant material showed that in each case it was 'cannabis' as defined in the DDA 1952, and nothing more. In addition, it is important to note that the court had also found that the chemist's testimony made no mention of the results of his physical examination; nor did he mention whether he had carried out any of the tests normally conducted by a chemist to confirm whether the plant material is cannabis, ie microscopic, Duquenois Levin and TLC tests. Thus, the combined effect of these two infirmities, which were overlooked by the trial judge, and his failure to make the basic finding of fact that the said plant material was cannabis within the meaning of s 2 of the Act, had left the court in doubt as to whether the accused had committed an offence for trafficking under ss 39B(1)(a) or 12(2) of the Act.

Having said the above, we are, however, of opinion that the evidence of the chemist, PW1, in the present appeal can be clearly distinguished from *Shukri*. Moreover, his evidence clearly does not suffer from the two defects or infirmities as in *Shukri*.

The relevant definition of 'cannabis' under s 2 of the Act at the time the offence was committed reads as follows:

> 'Cannabis' means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated. [Act A553 wef 15 April 1984].

It is clear to us, indeed we do concede, that in his evidence, PW1 had failed to state in an unequivocal term the words 's 2 of the Act'. But, taking his entire evidence which we have alluded to above, can it be said that his omission to state the aforesaid words 's 2' has cast a doubt, or to borrow the expression used in *Shukri*, has given rise 'to the inference that he did not have in mind the ingredients of cannabis as defined therein'? In our opinion, we do not think so (having in mind the oft-quoted cliche 'the Devil himself knows not the intent of men') for the following reasons. First, on this particular aspect of PW1's evidence, it is quite clear to us that his evidence did not stop at: 'I mean cannabis as defined under DDA 1952' as in *Shukri* and *Saime*. He went a step further by qualifying that 'resin had not been extracted', which no doubt is one of the ingredients of the definition of 'cannabis' in s 2, ie 'any part of any plant of the genus Cannabis from which *the resin has not been extracted*'. [Emphasis added.] In *Shukri*, the chemist said nothing about the resin. Thus, in substance, PW1

had the s 2 definition in mind. As for the word 'genus', it simply means 'a class or group of similar animals or plants' (*BBC English Dictionary 1992*). In fact, the issue before us is whether it is fatal to omit the words 's 2', and our answer is that it depends on the evidence of the chemist in each particular case. If the testimony of the expert witness satisfied the essential ingredients in the statutory definition of 'cannabis', then mere omission to mention the section would not be material, and should not affect his expert opinion. Of course, to avoid similar difficulty in future, it would have been better for the chemist to state: 'cannabis as defined in s 2 DDA 1952'.

Secondly, judging from his detailed testimony regarding his examination and analysis of the plant material found in the four envelopes, where he testified, inter alia, that the result of the microscopic examination showed positively there was presence of cannabis resin and the Duquenois Levin and TLC tests confirmed that the plant material was cannabis, we form the view that the cannabis he was talking about is cannabis under s 2 of the Act, and not Indian Hemp. Again, unlike *Shukri*, PW1's evidence did not suffer from the defect that he made no mention of the result of his examination and laboratory tests, one of the infirmities which the court in *Shukri* had taken into consideration in giving the benefit of the doubt in favour of the accused.

Thirdly, unlike *Shukri*, the learned judge at least adverted to the chemist's evidence that the plant material was cannabis as defined under DDA 1952 in his grounds of judgment, although falling into error by not stating the words 'section 2'.

Therefore, from the combined effect of the evidence of the chemist, PW1, which are clearly distinguishable from *Shukri*, we have no hesitation in coming to the conclusion that his omission to state that by 'cannabis' he meant cannabis as defined under *s 2* of the DDA 1952, has not given rise to the inference that he did not have in mind the ingredients of 'cannabis' in the said section.

Now, in distinguishing the facts, ie evidence in this case from those in *Shukri* and coming to our conclusion as we do here, we are reminded of the speech of the Lord Chancellor, Earl of Halsbury in *Quinn v Leathem* [1901] AC 495 HL at p 506:

> ... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow

logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

Accordingly, in our judgment, this appeal is dismissed. Conviction upheld and sentence affirmed.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim